# 82-1716



No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

---

October Term, 1982

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ORIN G. GROSSMAN,
Petitioner,

vs.

THE HONORABLE ROGER D. FOLEY,
UNITED STATES DISTRICT JUDGE,
FOR THE DISTRICT OF NEVADA,
Respondent.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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ORIN G. GROSSMAN
PROFESSIONAL CORPORATION

and

WARD & MAGLARAS

and

GEORGE FOLEY, SR., Esquire

715 South Fourth Street
Las Vegas, Nevada 89101
(702) 382-3134

Attorneys for Petitioner

## Questions Presented for Review.

1. Should this Court review the decision of the Ninth Circuit Court of Appeals which is contrary to the only other reported decision which holds that a District Court may not detach documents and file the same so as to constitute a part of the record when no party has requested the same?

2. Should this Court review the decision of the Ninth Circuit Court of Appeals which departs from the clear and certain time limits of the Federal Rules of Civil Procedure so as to allow a District Court to invoke its jurisdiction to vacate an otherwise final judgment dismissing an action?

## Parties in the Court of Appeals.

Petitioner, Orin G. Grossman, is one of the defendant-appellants in an action brought in United States District Court for the District of Nevada and subsequently appealed to the United States Court of Appeals for the Ninth Circuit. The Honorable Roger D. Foley, United States District Judge for the District of Nevada, was the Respondent in the Ninth Circuit Court of Appeals. The Federal Trade Commission was the Plaintiff in the District Court and the real party in interest in the Ninth Circuit Court of Appeals.

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**FEDERAL RULES OF CIVIL PROCEDURE**

## LOCAL RULES OF CIVIL PROCEDURE



## TEXTS AND TREATISES

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## OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ___ F.2d _____ (9th Cir. 1983), and is set out at page 1 of the Appendix (hereinafter cited as "App. ...").

The opinions of the United States District Court for the District of Nevada are reported at ___ F.Supp. ___ (D. Nev. 198_), and are set out at App. 4, App. 8, and App. 9.

## GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The decision of the United States Court of

Appeals was issued January 21, 1983.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

Federal Rules of Civil Procedure, Rule 5(e), provides, in relevant part:

(e) **Filing with the Court Defined.** The filing of pleadings and other papers with the Court as required by these rules shall be made by filing them with the Clerk of the Court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Federal Rules of Civil Procedure, Rule 52(b), provides, in relevant part:

Upon motion of a party made not later than ten days after entry of judgment, the Court may amend its findings or make additional findings and may amend the judgment accordingly.

Federal Rules of Civil Procedure, Rule 59, provides, in relevant part:

(b) A motion for a new trial shall be served no later than ten days after the entry of judgment.

(e) A motion to alter or amend the judgment shall be served not later than ten days after the entry of judgment.

Federal Rules of Appellate Procedure, Rule 4, provides, in relevant part:

A notice of appeal in which the United States or an officer or agency thereof is a party, has

sixty days after entry to file an appeal.

**STATEMENT OF THE CASE.**

That on or about May 26, 1978, the United States of America as Plaintiff filed a complaint in Case No. LV 78-94 RDF against Brooks Rent-A-Car, Inc., a Nevada Corporation (hereinafter referred to as "Brooks") alleging that the Defendant, Brooks, had violated a Federal Trade Commission (hereinafter referred to as "F.T.C.") Order. The action is a civil penalty action brought under Sections (5)(1) and 16(A)(1) of the Federal Trade Commission Act, Title 15 U.S.C., Sections 45(1) and 56(A)(1).

That on or about July 21, 1980, the F.T.C. moved the District Court, pursuant to Local Rule 15(a), to amend, file, and serve a complaint by adding Petitioner, ORIN G. GROSSMAN, as a party Defendant.

The F.T.C. alleged among other things that Petitioner, ORIN G. GROSSMAN, was responsible for the content and placement of some 44 advertisements from July 24, 1975, through June, 1976, that were in violation of the F.T.C. order. The F.T.C. also sought to amend its complaint to allege facts to reflect how Petitioner violated the F.T.C. order.

The District Court granted the F.T.C.'s motion to amend, file, and serve the Amended Complaint on November 10, 1980. However, the F.T.C. never filed an amended complaint as required by Local Rule 15(a), nor has a F.T.C. filed amended complaint been served on Petitioner as required by Federal Rules of Civil Procedure, Rules 4 and 5.

On or about June 4, 1981, the F.T.C. filed a motion for summary judgment concerning the liability of Petitioner. In response to the F.T.C.'s motion, Petitioner filed a motion to

dismiss (1) for lack of jurisdiction pursuant to Federal Rule of Civil Procedure, Rule 12(b), and (2) that the Court had no jurisdiction over Petitioner because the F.T.C. never followed the District Court's Order and no amended complaint had ever been filed, and no amended complaint had ever been served on Petitioner.

On November 9, 1981, the District Court entered a Minute Order directing the Clerk of the District Court to file the proposed amended complaint that was attached as an exhibit to the F.T.C.'s Motion to Amend. See App. 2. The District Court directed the Petitioner to answer the amended complaint and to file a response to the F.T.C.'s motion for summary judgment.

The District Court again denied Petitioner's motion to dismiss without prejudice subject to renewal as against the amended complaint if it were deemed appropriate.

On November 27, 1981, Petitioner renewed his motion to dismiss for lack of jurisdiction pursuant to Federal Rules of Civil Procedure, Rules 12(b)(2) and 12(b)(5), because the F.T.C. again did not file the proposed amended complaint.

On or about March 17, 1982, the District Court granted without prejudice Petitioner's motion to dismiss in a lengthy written opinion. See App. 4. The Order of Dismissal was filed March 18, 1982, and Judgment entered on May 11, 1982. See App. 8.

On or about June 28, 1982, the F.T.C. moved the District Court to vacate its Judgment and Order of Dismissal.

That despite Petitioner's objections, the District Court without an opinion reversed its Order and Judgment of Dismissal as against Petitioner as well as Brooks on September 9,

1982, and again caused an amended complaint to be filed against Petitioner dated November 9, 1981. See App. 9.

That on September 30, 1982, Petitioner was served with a Summons dated September, 1982, and part of an amended complaint.

The filing of the Amended Complaint and reversing its Judgment and Order of dismissal by the Honorable Roger D. Foley are erroneous in that the District Court lacked jurisdiction (1) to choose what to file and to file documents on behalf of a party and (2) to entertain the F.T.C.'s Motion to Vacate the Judgment of Dismissal since no motions were made pursuant to Federal Rules of Civil Procedure Rules 52 or 59 within the time period prescribed by such rules. In addition, no Notice of Appeal was filed by the F.T.C. within the prescribed period of time. That in view thereof, the Honorable Roger D. Foley should have entered an order in favor of Petitioner by denying the F.T.C.'s Motion to Vacate Judgment and Order of Dismissal on the grounds that the Court lacked jurisdiction to entertain or grant such a motion at that time.

Grossman filed a Petition for Writ of Mandamus and Certiorari or Writ of Prohibition to the Ninth Circuit Court of Appeals. On January 21, 1983, the Ninth Circuit Court of Appeals denied the writ, stating that Grossman has failed to demonstrate a clear and indisputable right to the extraordinary relief he seeks. See App. 1.

Grossman now petitions this Court to review the conclusion by a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## REASONS FOR ALLOWANCE OF THE WRIT

### I.

**THE NINTH CIRCUIT HAS CONSTRUED FEDERAL RULE OF CIVIL PROCEDURE RULE 5(e) TO PERMIT A JUDGE TO DETACH EXHIBITS AND FILE THEM WITH THE CLERK IN ORDER TO SELECTIVELY CHOOSE WHAT DOCUMENTS SHALL CONSTITUTE THE DISTRICT COURT RECORD THEREBY DEPARTING FROM THE LONG-STANDING RULE OF AN IMPARTIAL TRIBUNAL AND CREATING A CONFLICT WITH THE ONLY OTHER REPORTED DECISION OF A COURT OF APPEALS.**

The conflict just described is real, as demonstrated in the following paragraphs.

Federal Rules of Civil Procedure, Rule 5, provides in pertinent part that:

(e) **Filing with the Court Defined.** The filing of pleadings and other papers with the Court as required by these rules shall be made by filing them with the Clerk of the Court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk. (Emphasis supplied.)

The filing of pleadings directly with the Court is not a procedure to be invoked by the Court for the purpose of selectively determining what papers should properly constitute the trial record of the controversy before it. The use of the term "may permit" instead of "may order" suggests that such filing is proper only when the Court's discretion has been invoked by one of the parties for good cause, and that the rule was not intended to be invoked by the Court sua sponte. International Business Machines Corp. v. Edelstein, 526 F.2d 37 (CA 2nd, 1975).

In the case at bar, the F.T.C. filed a motion to amend the original complaint and to add a party Defendant. This motion was granted on July 21, 1980. The F.T.C. has never filed an amended complaint. The District Court, sua sponte, on November 9, 1981, directed the Clerk to detach the proposed amended complaint from the F.T.C.'s Motion to Amend and caused the same to be filed with the District Court Clerk, and then did the same again on September 9, 1982.

Even a most liberal interpretation of F.R.C.P. 5(e) cannot possibly grant a District Court the power to determine what documents shall be filed with the Clerk thereby making a trial record.

The Ninth Circuit's decision here is in direct conflict with the Second Circuit's decision in **International Business Machines Corp.** v. **Edelstein**, 526 F.2d 37 (2nd Cir, 1975), which clearly held a Court could not invoke F.R.C.P. 5(e) sua sponte. To allow a district judge the power and authority to determine on his own what documents should be filed, especially an amended complaint seeking to add a party defendant to the original cause, destroys the long-standing theory of an impartial tribunal and would tend to tarnish the American theory of jurisprudence.

## II.

## THE NINTH CIRCUIT'S DECISION CREATES JURISDICTION FOR A DISTRICT COURT TO REVIEW A FINAL JUDGMENT WHERE NONE EXISTS THEREBY RENDERING A FINAL JUDGMENT UNCERTAIN WHICH IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

An order of dismissal of a complaint is a final and appealable order when it is followed by the entry of a judgment dismissing the action.

Richardson v. United States, (CA 9th, 1964) 336 F.2d 265; Midwestern Dev. Inc. v. City of Tulsa, (CA 10th, 1963) 319 F.2d 53.

In the case at bar, an order dismissing the complaint was entered in this matter on March 17, 1982. Thereafter, a final judgment was entered on May 11, 1982, dismissing the F.T.C.'s claims without prejudice. The judgment dismissing the claims of the F.T.C. without prejudice is and was a final order within the meaning of 28 U.S.C. Section 1291. See for example: Ruby v. Secretary of United States Navy, (CA 9th, 1966) 365 F.2d 385; Stewart v. Lincoln Douglas Hotel Corp., 208 F.2d 379 (CA 7th, 1954).

The only remedy a Plaintiff has once a motion to dismiss the complaint is sustained is to amend the complaint. Absent such an amendment and the election to stand upon the complaint, Plaintiff's only remedy is to appeal from a subsequent judgment dismissing the action. Crutcher v. Joyce, 134 F.2d 809 (CA 10th, 1943).

In the instant case, a final judgment was entered in this matter on May 11, 1982, dismissing the claims against Petitioner. No motions were made for a new trial or to amend findings of fact, conclusions of law, or the judgment, within the mandatory time limit of ten (10) days as set forth by the Federal Rules of Civil Procedure. The F.T.C.'s Motion to Vacate Judgment and Order of Dismissal was filed some 50 days after judgment had been entered. On July 1, 1982, the F.T.C.'s only remedy to reverse the Judgment entered on May 11, 1982, was to file a Notice of Appeal pursuant to Federal Rules of Appellate Procedure, Rule 4. Having failed to appeal within sixty days after the final judgment, the dismissal of the Complaint has become final for all intents and purposes.

The District Court's reversal of its prior Order and Judgment at the F.T.C.'s request, is an

usurpation of jurisdiction to review final judgments. No authority exists for a District Court to act as its own Court of Appeals and the result of such action is null and void.

In the F.T.C.'s motion to vacate the Judgment and Order of Dismissal, the F.T.C. suggested that the District Court amend its findings. In order for a District Court to amend its own findings, Rule 52(b) of the Federal Rules of Civil Procedure clearly states:

Upon motion of a party made not later than ten days after entry of judgment, the Court may amend its findings or make additional findings and may amend the judgment accordingly. (Emphasis added.)

It is respectfully submitted that the ten days from the entry of judgment (whether the entry of judgment is read to be March 19, 1982, which is stamped on the Order of Dismissal, which is the Judgment entered pursuant to Rules 58 and 79, or even using the recording date of May 11, 1982) had without question run.

When the District Court ruled upon Petitioner's Rule 12 motion, it was a trial of those issues and a final judgment was entered accordingly. See 5(A) Moores Federal Practice, Paragraph 52.08. It is, therefore, obvious that if the F.T.C. had wished to move to amend the findings, it would have had to have done so within ten days or at the very latest by May 21, 1982 (Judgment, May 11, 1982).

In addition, F.R.C.P. 59 (New Trials; Amendments of Judgments) of the Federal Rules of Civil Procedure also precluded the District Court from acting. Rule 59(b) of the Federal Rules of Civil Procedure clearly states:

A motion for a new trial shall be served no later than ten days after the entry of judgment. (Emphasis added.) and;

Rule 59(e) states:

A motion to alter or amend the judgment shall be served not later than ten days after the entry of the judgment. (Emphasis added.)

As has been held time and time again, a motion for a new trial, or for reconsideration of a prior order or judgment must be, at the very least, served not later than ten days after entry, and if not, a District Court loses any jurisdiction whatsoever to act. See 6A Moores Federal Practice, Section 59.09[3], 59.12(2) Supp., which cites **Brown v. Wright**, (CA 9th, 1978) 588 F2d 708; **Gribble v. Harris**, (CA 5th, 1980) 625 F2d 1173; **Han v. Becker**, (CA 7th, 1977) 551 F2d 741; **Gonzalez v. Gonzalez** (D PR 1973) 385 F Supp 1226; **Jetero Construction Co. v. South Memphis Lumber Co.** (CA6th, 1976) 531 F2d 1348, 21 FR Serv2d 642; **Usery v. Local Union No. 2047, Int.Bth'd of Electrical Workers AFL-CIO** (D Minn, 1976) 22 FR Serv2d 1232; **Admiral Theatre Corp. v. Douglas Theatre Co.** (CA8th, 1978) 585 F2d 877; **Fassler v. Moran** (CA9th, 1978) 579 F2d 1372; **Moore v. St. Louis Music Supply Co.** (CA8th, 1975) 526 F2d 801; **Boggs v. Dravo Corp.** (CA3d, 1976) 532 F2d 897, 21 FR Serv2d 598; **Sea Ranch Ass'n v. California Coastal Zone Conservation Commissions** (CA9th, 1976) 537 F2d 1058, 21 FR Serv2d 1437; **Seshachlam v. Creighton University School of Medicine** (CA8th, 1976) 545 F2d 1147, 22 FR Serv2d 1042; **Saunders v. Cabinet Makers & Millmen Local 721** (CA9th, 1977) 549 F2d 1216.

Even though a District Court may on its own amend a judgment, a District Court is also limited to the same ten day period after Judgment [F.R.C.P., Rule 59(d)]. The ten day limitation stated in Rules 52 and 59 are not subject to enlargement after the ten days has run, F.R.C.P. 6(b).

Every case that was cited by the F.T.C. in

support of its motion to overturn the Order and Judgment of Dismissal was an argument to reverse the Judgment and to allow it to perfect service of process. In addition to the authority hereinbefore cited, the District Court in its Order of March 17, 1982, recognized that this was the very same argument which was previously made by the F.T.C. in their Points and Authorities in opposition to Petitioner's Rule 12 Motion to Dismiss, and the District Court stated in its Judgment that: "The Government argues that the proper procedure in this instance is not to dismiss this action, but to allow the Government to perfect service of process", and specifically ruled against the F.T.C.'s argument.

The F.T.C. was, in its Motion to Vacate Judgment and Order of Dismissal, asking the District Court to act as its own Court of Appeals. Even if the District Court could so act, the F.T.C. waited too long for any appeal whatsoever.

It is respectfully submitted that not only had the time run against the F.T.C. to file any motion, but the time had also run against the F.T.C. for the filing of a Notice of Appeal. Rule 4 of the Federal Rules of Appellate Procedure clearly states that:

A notice of appeal in which the United States or an officer or agency thereof is a party, has sixty days after entry to file an appeal.

Therefore, the latest the F.T.C. could have appealed would have been July 11, 1982, and that time too came and went.

F.R.C.P. 60(a) permits the correction of clerical mistakes in judgments, orders or other parts of the record arising from oversight, or omission. Errors of a more substantial nature are to be corrected by a motion under Rule 59(e). Thus, a motion under Rule 60(a) can only be used

to make a judgment speak the truth and cannot be used to make the record say something other than what was originally pronounced. **United States v. Kenner**, 455 F.2d 1 (CA 7th, 1972); **Dow v. Baird**, 389 F.2d 882 (CA 10th, 1968); **Matthies v. Railroad Retirement Bd.**, 341 F.2d 243 (CA 8th, 1965).

Rule 60(a) is not a vehicle for relitigating matters that already have been litigated and decided, nor can it be used to change what has been deliberately done. **Ferraro v. Arthur M. Rosenburg Co. of New Haven, Connecticut**, 156 F.2d 212 (CA 2nd, 1946); **Hoffman v. Celebrezze**, 405 F.2d 833 (CA 8th, 1969).

In the instant case, the F.T.C. relitigated matters which were previously briefed, argued and disposed of. The Order and Judgment of the District Court was clear and deliberate in dismissing the amended complaint as the same relates to Petitioner. The District Court deliberately dismissed the amended complaint as to Petitioner and no clerical mistake was made in the entry of Judgment.

Nor could the F.T.C. claim surprise, inadvertence, or excusable neglect, since the F.T.C. admitted that it was in constant contact with the Clerk of the District Court discussing the Judgment for a period sometime beginning about March 17, 1982, until the filing of its motion on July 1, 1982.

The F.T.C. suggested that Rule 60(a) allowed blanket relief from a Judgment. As noted above, Rules 52 and 59 deal with major substantive changes in an order or a judgment. A motion under those rules must be made within ten (10) days after entry of Judgment. A Rule 52 or 59 motion, tolls the finality of a judgment. Rule 60, however, does not toll the finality of a judgment and is very limited. As pointed out in 6A Moore's Federal Practice, page 4023:

The finality of judgments is in no wise impaired.

and that an ajudication should be conclusive, subject to some correctional power.

Rule 60(a), as pointed out by Moore's, Volume 6A, page 4043, limits the term "clerical mistakes" to just that. Moore's states at page 4043 that:

...if the term 'clerical mistakes' is confined to its plain meaning and not inflated to include matters of substance no one can seriously contend that the stability of judgments is impaired.

Obviously, the District Court's findings that an amended complaint had never been filed is an irrefutable fact. The type of clerical errors envisioned by Rule 60(a) are, for example, where a court errs in a mathematical computation as to an amount due, i.e., clerical errors in transcription, copying, or calculation. **Burshad v. McDonough**, (CA7th, 1972) 469 F2d 1333, 16 FR Serv2d 1076. Entry of judgment against only one defendant is not a clerical error covered by Rule 60(a), **Stradley v. Cortez**, (CA3d, 1975) 518 F2d 488, 20 FR Serv2d 515. In **Scola v. Boat Frances R., Inc.**, (CAlst, 1980) 618 F2d 147 (noted in Moore's in its supplement to Volume 6A) that even where a district court had amended a judgment due to an error made by a clerk that:

...the fact that the error was made by the clerk and not the judge did not make it any less an error of law, nor convert it into the kind of clerical mistake covered by Rule 60(a). Such an error could have been challenged either on appeal or by timely Rule 59(e) motion to alter or amend the judgment. The court held, therefore, that because the error was one of law it could not be corrected out of time under Rule 60(a).

The cases are legion where Rule 60(a) applies to clerical errors such as the misnomer of a party, or the wrong designation by a jury of general and specific damages.

However, what must also be shown in a Rule 60 motion is that the aggrieved party was both unaware of the error and was misled by that error. The F.T.C. in its Motion to Vacate Judgment and Order of Dismissal, nowhere stated that it was misled, nor that it was unaware of what was taking place. What the F.T.C. asked the lower Court to do, and what the District Court did, was to reverse itself, and as heretofore pointed out, not only had the time run on a motion to amend or alter the Judgment of Dismissal, but the time had also run on even filing an appeal. As noted above, any motion made pursuant to Rule 60, does not affect the finality of a judgment, nor the time in which to appeal it.

The F.T.C. did not even suggest any error by the District Court in granting Petitioner's Motion to Dimiss and the Judgment entered in Petitioner's favor. The F.T.C. admited in its Reply Memorandum that:

> The motion that led to the order was brought by Mr. Grossman <u>alone</u>, and, in dismissing the action, this Court granted <u>only</u> 'the Defendant's (singular) motion to dismiss.'

The F.T.C. also admitted no error in the District Court's Order and Judgment dismissing Petitioner. In fact the F.T.C. did not even make a Rule 60 argument, other than in passing in a footnote in its motion to the District Court.

Therefore, it is quite obvious there was no error in the District Court's Order and Judgment dismissing Petitioner.

The F.T.C.'s final argument requested reversal of the District Court's Judgment pursuant to Rule 60(b). The F.T.C. did not designate which portion of 60(b) it was relying upon, although it stated that "...the Government's failure to ensure that Mr. Grossman was properly served was the result, at most, of mistake, inadvertence, or excusable neglect."

The F.T.C. did not mention the fact that an amended complaint was never even filed, having had since November 10, 1980, to do so, nor did it take issue with the fact that having known about the District Court's Judgment of Dismissal, and being in telephonic communication with the Clerk of the Court, why it did not file a Rule 52 or 59 motion after having knowledge and notice of the Order of Dismissal and Judgment of Dismissal.

Moore's states in Volume 7, page 217, that 60(b) is not a substitute for appeal and at page 253, citing numerous cases, Moore's further adds that:

> Thus it has been held that ignorance of Rule 6, which prohibits extension of the time for motions under Rules 50(b) and 59(b), (d), and (e), does not furnish a ground for relief under Rule 60(b)...

As the District Court pointed out in its Order of Dismissal, the F.T.C. had well over a year to act after receiving the Order of the District Court allowing it to act. This is not the type of mistake, inadvertence, or neglect envisioned by Rule 60(b). As stated by Moore's, Volume 7, at page 256:

> ...a party who makes an informed choice as to a particular course of action will not be relieved of the consequences when it subsequently develops that the choice was unfortunate.

Moore's cites numerous cases and especially

points out that where a party ignores an order of court, that such refusal to comply (with an order) cannot be termed "mistake" within Rule 60(b). In fact, Moore's points out, after reviewing numerous cases, that under Rule 60(b), a party must particularize why compliance was not met, and that excuses such as illness in the family, or the party had placed it in the hands of an attorney, does not fall under relief granted by 60(b).

Rule 60(b)(1) cannot be used simply to put further additional arguments on legal issues. **Weiner v. Sherburne Corp.**, (D Vt 1972) 57 FRD 636, 17 FR Serv2d 398, 7 Moore's Supp., page 32.

The F.T.C.' entire argument in its Motion to Vacate Judgment and Order of Dismissal had to do with service of process. It was again a re-argument of the grounds upon which the District Court based its dismissal. The F.T.C. has admitted that it never filed an amended complaint (after over a year) and did not even attempt to even perfect service (which the F.T.C. again admited on page 2 of its opening brief to reverse). The F.T.C. then suggested that having failed to both file and serve, it then made other mistakes, which were also excusable, in that it failed and neglected to make the proper motions to amend the facts or the Judgment, and suggested the District Court "...vacate both the judgment and its order of dismissal". The F.T.C. did not designate one special circumstance that would make Rule 60 applicable. 7 Moore's, at page 266, states:

Indeed, it is quite generally held that when a motion can fairly be characterized as one under Rule 59(e) (i.e., lacking any special circumstances justifying relief under Rule 60(b)) it **must** be filed within the 10-day period and will not be treated as a motion under Rule 60(b)(1). (Emphasis added) Citing cases.

As can be seen, Mr. Grossman petitioned the Ninth Circuit to regulate actions of the District Court which were entirely outside the trial court's discretion. Mr. Grossman petitioned the Ninth Circuit pursuant to the "All Writs Statute", 28 U.S.C., Section 1651. This is precisely the procedures followed in International Business Machines Corp. v. Edelstein, supra, wherein the Second Circuit stated:

Such actions are properly reviewable by writ of mandamus. See Parr v. United States, 351 U.S. 513, 520, 76 S.Ct. 912, 917, 100 L.Ed. 1377 (1956).

In the International Business Machines Corp. case, the Second Circuit stated that the All Writs Statute was designed to define the bounds of a trial court's descretion, wherein the Ninth Circuit in its opinion, App. 1, stated that the All Writs Statute would not be the proper vehicle.

It is respectfully submitted that there is a direct conflict between the Second Circuit and the Ninth Circuit defining the jurisdictional limits of a district court in filing documents on behalf of a party.

## CONCLUSION.

The present law of the Ninth Circuit as a result of its ruling in the instant matter is that a judge may sua sponte determine what documents may be made a part of the trial record. In addition, the mere entry of a final judgment no longer means the end of a case, but rather the final judgment is subject to revision by the trial judge at any time thereafter without reference to statute or rule of the United States.

This Court should grant a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision in this case.

Respectfully submitted,

ORIN G. GROSSMAN
PROFESSIONAL CORPORATION

and

WARD & MAGLARAS
By CHRIS MAGLARAS, JR.

and

GEORGE FOLEY, SR.

Attorneys for Petitioner

# APPENDIX

## APPENDIX.

**Order of the United States Court of Appeals for** the Ninth Circuit.

Orin G. Grossman, Petitioner, v. The United States District Court for the District of Nevada, Respondent, and Brooks Rent-A-Car, Inc., Real Party in Interest. No. 82-7605, DC# CV LV-78-94-RDF, Nevada (Las Vegas).

United States Court of Appeals for the Ninth Circuit. Filed January 21, 1983, Phillip B. Winberry, Clerk, U.S. Court of Appeals.

Before: SCHROEDER and NORRIS, Circuit Judges

Petitioner's "Motion for Extension of Time to File Brief" is construed as a motion for leave to file a late reply brief and is granted. The reply brief previously received shall be filed.

The petition for writ of mandamus is denied. Petitioner has failed to demonstrate a clear and indisputable right to the extraordinary relief he seeks. See Will v. Calvert Fire Insurance, 437 U.S. 655 (1978); In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297, 1305 n.5 (9th Cir. 1982).

The stay of proceedings in the district court is vacated.

MoCal 1/17/83

**Minutes of the Court.**

United States of America, Plaintiff, v. Brooks Rent-A-Car, Inc., Defendant. Civil-LV 78-94, RDF.

Dated: November 9, 1981.

Filed: November 9, 1981.

Present: The Honorable Roger D. Foley United States District Judge. Deputy Clerk: Preston Bluiett, Jr. Reporter: None Appearing. Counsel for Plaintiff(s): None Appearing. Counsel for Defendant(s): None Appearing. Minute Order in Chambers XXXX.

In Court Proceedings:

In view of this Court's Order dated November 10, 1980, granting the Plaintiff's Motion to Add a Defendant and Amend Complaint, filed July 21, 1980, the Clerk is directed to forthwith detach the proposed amended complaint from the motion to amend and cause the same to be file marked with the same date of this order—November 9, 1981.

IT IS SO ORDERED:

1. The Defendants will have to and including Monday, November 30, 1981, 4 o'clock p.m., within which to file and serve an answer to the amended complaint.

2. The Motion to Dismiss for want of Jurisdiction, filed June 19, 1981, on behalf of Orin G. Grossman, is denied without prejudice to renewal as against the amended complaint if it is deemed to be appropriate.

3. The November 16, 1981, scheduled hearing on the Plaintiff's motion for summary judgment concerning the liability of Orin Grossman, filed June 4, 1981, is vacated.

4. The Defendants will be allowed to and including Monday, November 30, 1981, 4 o'clock p.m., within which to file and serve a response to the pending motion for summary judgment. The Plaintiff will be allowed to and including Thursday, December 10, 1981, 4 o'clock p.m., within which to file and serve a reply.

Carol C. Fitzgerald, Clerk
By: [ILLEGIBLE]
Deputy Clerk

**Order of Dismissal.**

In the United States District Court for the District of Nevada.

United States of America, Plaintiff, v. Brooks Rent-A-Car, Inc., Defendant. Civil-LV 78-94, RDF.

Filed: March 18, 1982

Entered: March 19, 1982.

This is a civil penalty action brought under Section 5(1) and 16(a)(1) of the Federal Trade Commission Act, Title 15 U.S.C. §§ 45(1) and 56(a)(1), seeking civil penalties and injunctive relief based on certain advertisements alleged to be in violation of a Federal Trade Commission (FTC) order. In its initial complaint filed May 26, 1979, the Government alleges that Brooks Rent-A-Car, Inc. (Brooks), violated the FTC order at least eighty-nine times, from on or about July 17, 1975, to the present, by causing to be placed in publication of interstate circulation certain advertisements that did not include all the charges or conditions as required by the FTC order.

On July 21, 1980, the Government moved to amend its complaint to add Orin Grossman, attorney for and former officer of Brooks, as a defendant. The Government alleged that Orin Grossman was responsible for the content and placement of some forty-four advertisements from July 24, 1975, through June 1976 that were in violation of the FTC order. The Government sought to amend its complaint, both to add Orin Grossman as a defendant and to allege facts to reflect how Orin Grossman violated the FTC order.

Attached to the motion to amend was the original amended complaint and the accompanying exhibits. A copy of the motion and the

attachments was served on Orin Grossman. This Court granted the motion to amend on November 10, 1980. However, the Government never filed the amended complaint as required by Local Rule 15(a), nor had an officially filed amended complaint served on defendant Grossman as required by Rules 4 and 5, Federal Rules of Civil Procedure. Utility Mfg. Co. v. Elgin Laboratories, 1 F.R.D. 165 (S.D.N.Y. 1939).

The defendant Orin Grossman filed a motion for a rehearing on the order granting the motion to amend, which was denied by minute order on February 5, 1981. The Government then filed a motion for summary judgment concerning the liability of Orin Grossman on June 4, 1981. At the time of the motion, there was still no official amended complaint filed with the court as required by Local Rule 15(a) and no attempted service of an official amended complaint by the Government. In response to the Government's motion, the defendant filed a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b), FRCP. The defendant argued that this Court had no jurisdiction over him because no amended complaint had ever been filed with the court and no amended complaint had ever been served on the defendant.

On November 9, 1981, this Court entered a minute order directing the Clerk of the Court to officially file the original amended complaint that was attached to the Government's motion to amend. It also directed the defendant to answer the amended complaint and to file a response to the motion for summary judgment. The Court also denied the motion to dismiss without prejudice subject "to renewal as against the amended complaint if it is deemed to be appropriate." The Government took no action to perfect service of the officially filed amended complaint and no officially filed amended complaint has been served on defendant Grossman even though this Court granted the motion to amend over one year

ago.

**MOTIONS BEFORE THIS COURT**

On November 27, 1981, the defendant Orin Grossman renewed his motion to dismiss for lack of jurisdiction pursuant to Rule 12(b) because the Government never served the officially amended complaint on him. The Defendant has also filed a motion to be relieved as attorney of record.

This Court ordered the Clerk of the Court to file the original amended complaint because it believed that this defendant had waived his right to object to the lack of service of process because the defendant filed his original motion to dismiss seven months after this Court ruled on the motion to amend the complaint. Upon further review of the record, it is obvious that the defendant did not waive his right to object since the Government never filed the additional amended complaint as required by Local Rule 15. The defendant only objected when the Government attempted to move for summary judgment on an amended complaint which was not properly filed with the court. It is clear from the record and the Government admits that it has never filed the additional amended complaint nor even attempted service of an amended complaint on this defendant.

The Government argues that the proper procedure in this instance is not to dismiss the action, but to allow the Government to perfect service of process. A close review of the cases cited by the Government shows that courts have applied that procedure in cases where there is a defect in the attempted service of an officially filed complaint. See Alexander v. Unification Church of America, 634 F.2d 673, 675 (2nd Cir. 1980). Courts also have the discretion to dismiss the action without prejudice. It appears that where an amended complaint has not been properly filed

with the court and not served on the defendant, this court simply has no jurisdiction over the defendant and dismissal without prejudice is the better remedy. See Aetna Business Credit v. Universal Decor, 635 F.2d 434, 435 (5th Cir. 1981); Mooney Aircraft v. Donnelly, 402 F.2d 400 (5th Cir. 1968); Beecher v. Wallace, 381 F.2d 372, 373 (9th Cir. 1967); 4 Wright & Miller, Federal Practice and Procedure § 1063.

Therefore, defendant's motion to dismiss is hereby granted pursuant to Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficiency of service of process. The Government's claims in the amended complaint are dismissed without prejudice.

The defendant Orin Grossman's motion to withdraw as counsel of record is hereby granted.

DATED: March 17, 1982.

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DISTRICT JUDGE

**Judgment.**

United States District Court for the District of Nevada at Las Vegas.

United States of America, Plaintiff, v. Brooks Rent-A-Car, Inc., Defendant. Civil Action File No. 78-94, RDF.

Filed: May 11, 1982.

Entered: May 11, 1982.

This action came on for consideration before the Court, Honorable Roger D. Foley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendant ORIN GROSSMAN'S Motion to Dismiss is granted pursuant to Rule 12(b)(2) for lack of personal jurisdiction and Rule 12(b)(5) for insufficiency of service of process. The Government's claims in the Amended Complaint are dismissed without prejudice.

Dated at Las Vegas, Nevada, this 11th day of May, 1982.

Carol C. Fitzgerald
Clerk of Court
By /s/ Patricia Lamb
Deputy Clerk

**Minutes of the Court.**

United States of America, Plaintiff, v. Brooks Rent-A-Car, Inc., Defendant. Civil-LV 78-94, RDF.

Dated: September 9, 1982.

Filed: September 9, 1982.
September 15, 1982.

Present: The Honorable Roger D. Foley United States District Judge. Deputy Clerk: Preston Bluiett, Jr. Reporter: None Appearing. Counsel for Plaintiff(s): None Appearing. Counsel for Defendant(s): None Appearing. Minute Order in Chambers XXXX.

In Court Proceedings:

IT IS SO ORDERED:

1. The Motion of the United States to Vacate Judgment and Order of Dismissal (#70), filed July 1, 1982, is granted.

2. The Motion to Strike (#71), filed July 15, 1982, on behalf of Orin G. Grossman, is denied.

Carol C. Fitzgerald, Clerk
By: [ILLEGIBLE]
Deputy Clerk